

FILED

JUL - 5 2005

  
Clerk

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
CENTRAL DIVISION

\*\*\*\*\*  
WAYNE HOBART BIG CROW,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

\*\*\*\*\*  
CIV 05-3008

\*\*\*\*\*  
ORDER AND OPINION DENYING  
CERTIFICATE OF APPEALABILITY

\*\*\*\*\*  
TO THE EIGHTH CIRCUIT COURT OF APPEALS:

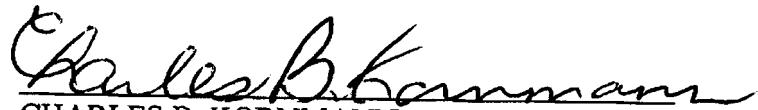
Petitioner filed a motion to vacate, set aside, or correct his conviction and sentence, contending that he was entitled to relief under the United States Supreme Court's decisions in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), Blakely v. Washington, 124 S.Ct. 2531 (2004), and United States v. Booker, 125 S.Ct. 738 (2005). The motion was filed beyond the one year period of limitations set forth in 28 U.S.C. § 2255. I summarily dismissed the petition upon initial consideration due to procedural default, finding that Apprendi, Blakely, and Booker have not been found to be retroactive on collateral review.

Pursuant to 28 U.S.C. § 2253, a certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. Petitioner did not and has not made a substantial showing of the denial of a constitutional right.

IT IS HEREBY CERTIFIED that there does not exist probable cause of an appealable issue with respect to the Court's order denying petitioner's motion to vacate, set aside or correct his sentence.

Dated this 5th day of July, 2005.

BY THE COURT:

  
CHARLES B. KORNMANN  
U.S. District Judge

ATTEST:  
JOSEPH HAAS, CLERK

  
BY:   
DEPUTY  
(SEAL)